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IN THE

Supreme Court of the United States

October Term, 1940

No. 871

NIAGARA HUDSON POWER CORPORATION,
Petitioner,

against

JAMES J. HOEY, Collector of Internal Revenue,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

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Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Niagara Hudson Power Corporation respectfully petitions for a writ of certiorari of this Court to review a decision of the United States Circuit Court of Appeals for the Second Circuit, rendered on February 3, 1941, which affirmed a decision of the District Court of the United States for the Southern District of New York, rendered on July 11, 1940, dismissing petitioner's suit for a refund of documentary stamp taxes in the amount of $260,969.04 paid under protest to the respondent, as Collector of Internal Revenue for the Second District of New York.

Summary Statement of the Matter Involved.

Petitioner is a corporation of the State of New York, formed February 1, 1937 by the consolidation, pursuant to the provisions of the Stock Corporation Law of New York,* of two existing or constituent New York corporations, Mohawk Hudson Power Corporation and Niagara Hudson Power Corporation (constituent). (R. 53**)

Prior to the consolidation to form petitioner, Niagara Hudson (constituent) owned 99% of the common stock and a substantial amount of the two classes of preferred stock of Mohawk Hudson. The latter also owned a substantial (although a minority) interest in the common stock of Niagara Hudson (constituent). Mohawk Hudson was operated as a subsidiary of Niagara Hudson (constituent). (R. 54-58)

Included in the business, properties and assets of each of the constituent corporations at the time of the consolidation were various shares of stock in other corporations, principally public utility operating corporations organized under the laws of the State of New York. Niagara Hudson (constituent) owned a substantially larger number of shares and in many more such corporations than were owned by Mohawk Hudson. (R. 59)

The separate proposals to consolidate the constituent corporations into a single consolidated corporation were voted upon at separate meetings of the stockholders of

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* The pertinent sections of the Stock Corporation Law of New York, as in effect on February 1, 1937, are printed in the Appendix, beginning on page 32.

** The Record references are to the folio numbers of the Record in the Circuit Court of Appeals.

the constituent corporations. The filing of the certificate of incorporation creating petitioner as a consolidated corporation was authorized by the vote of the holders of more than two-thirds of the voting stocks of each of the constituent corporations. (R. 64-66, 74-78)

Upon the filing of the certificate of consolidation in the office of the Secretary of State of the State of New York, under the New York law, the corporate powers of the constituent corporation became the corporate powers of the petitioner, the respective stockholders of the constituent corporations thereupon became stockholders of petitioner, and the separate corporate entities of the constituent corporation terminated (Sections 86 and 88, Stock Corporation Law of New York). Petitioner, as the consolidated corporation created out of the constituent corporations, became vested with all of the rights, powers, privileges, franchises, businesses and assets of the two constituent corporations of every character, including the shares of stock in other corporations then owned by each of the constituent corporations, and the petitioner became liable for all of the liabilities and obligations of each of the constituent corporations (Section 89, Stock Corporation Law of New York).

Following the consolidation, no physical delivery, endorsement or assignment of the shares of stock in other corporations, previously owned by the constituent corporations, was made; and, except for the certificate of consolidation, no memorandum, agreement, paper, document or instrument of any character was executed or delivered to vest in petitioner ownership of the stock. Furthermore, none of the certificates for such shares of stock were

presented to the issuing corporations for transfer into the name of petitioner; and no such transfers were registered upon the stock ledgers or registers of such issuing corporations. No Federal documentary stamps were affixed to the certificate of consolidation or to any of the certificates for shares of stock in other corporations, the ownership of which vested in the consolidated corporation upon its coming into existence. (R. 86)

In October 1938, more than a year and one-half after the consolidation became effective, the Commissioner of Internal Revenue assessed a documentary stamp tax against petitioner in the amount of $260,969.04 and (on October 14, 1938) delivered to petitioner a notice and demand for the tax, describing the same as a documentary stamp tax. On October 21, 1938 the petitioner paid the tax under protest and immediately brought this action to recover the amount thereof. (R. 87-89)

The Federal documentary stamp tax statute, as in effect February 1, 1937, included a provision which imposes a tax:

> "On all sales, or agreements to sell, or memorandum of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights)." (Section 800, Schedule A-3 of Title VIII of the Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101, as amended by Section 723(a) of the Revenue Act of 1932, c. 209,

47 Stat. 169, 272; 26 U. S. C. A. Internal Revenue Acts, page 290).[1]

In Treasury Regulations 71 (1932 Ed.), entitled "Regulations 71 Relating to Stamp Taxes", issued with the approval of the Secretary of the Treasury pursuant to statute, there is a provision in Article 35(r) which reads:

> "Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfers of stock from decedent to executor."

Petitioner contends that when the ownership of the shares of stock, along with all of the other powers, rights, interests, franchises, businesses, properties and assets of the constituent corporations, vested in the petitioner upon its creation as a consolidated corporation, in accordance with the statutory proceedings, such a vesting of ownership in petitioner was not a "sale, agreement to sell, memorandum of sale, or delivery of, or transfer of legal title to" the shares of stock in other corporations within the provisions of the Federal taxing statute; that in the circumstances here presented the Federal taxing statute necessarily depends for its operation upon the law of the State of New York and that, as a matter of such state law, whatever "transfer of legal title" which may be said to have occurred, as an incident to the organization of petitioner and the vesting of the ownership of its properties, including the shares of stock in other corporations,

[1] Printed in full in the Appendix at p. 30.

was a transfer "wholly by operation of law" and was thus expressly exempt from tax under the provisions of Article 35(r) of Treasury Regulations 71.

The respondent Commissioner asserts, on the other hand, that the vesting in petitioner of the ownership of shares of stock theretofore owned by the constituent corporations should not be considered as "wholly by operation of law", because in the proceedings preliminary to the filing of the certificate of incorporation in the office of the Secretary of State of the State of New York, creating petitioner as a consolidated corporation, there were voluntary acts, such as the votes of the respective stockholders of the constituent corporations.

Respondent relies upon Article 34(r) of Treasury Regulations 71, wherein there is stated as an "example" of a transaction subject to a tax, "Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation, from the name of the first to the name of the second corporation, is a transfer effected by the action of the parties and not wholly by operation of law". Respondent contends that the "example" so described should be interpreted by the court so that it shall be extended to include the corporate proceedings under the New York law applicable to a consolidation. In support of that contention respondent asserts (erroneously, we believe) that in determining liability for the Federal documentary stamp tax the distinction made in the New York law between the separate statutory proceedings to effect the *merger* of one New York corporation into another corporation and to *consolidate* two or more constituent corporations to form a new, consolidated corporation should be ignored.

Jurisdictional Statement.

The jurisdiction of this Court arises by virtue of the provisions of Section 240(a), Judicial Code, as amended by the Act of February 13, 1925.

In the District Court petitioner moved for summary judgment, pursuant to Rule 56 of the Rules of Civil Procedure, upon the complaint, the answer and the stipulated facts. The Commissioner thereupon filed a cross-motion for summary judgment. (R. 43-48)

The opinion of the District Court was filed July 11, 1940, and the order and judgment of the District Court denying petitioner's motion and granting respondent's cross-motion was filed in the office of the Clerk of the District Court July 31, 1940. (R. 247-264)

Petitioner duly perfected an appeal to the Circuit Court of Appeals for the Second Circuit, and on February 23, 1941 that Court filed an opinion affirming the decision of the District Court.*

The mandate of the Circuit Court of Appeals for the Second Circuit, dated February 19, 1941, was filed with the clerk of the United States District Court for the Southern District of New York on February 20, 1941.

This petition is presented by petitioner for a writ of certiorari to review the said decision of the Circuit Court of Appeals for the Second Circuit.

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* The opinion is printed in full *infra* at page 26.

Questions Presented.

Did the vesting, pursuant to the provisions of Section 89 of the New York Stock Corporation Law, in petitioner, as a consolidated corporation, of the ownership of shares of stock issued by other corporations, owned by the two constituent corporations which were consolidated pursuant to proceedings taken under Section 86 of the Stock Corporation Law of the State of New York, constitute a "sale of", or "agreement to sell", or a "memorandum of sale" or a "transfer of legal title to" such shares of stock, which is taxable under Section 800, Schedule A-3 of Title VIII of the Revenue Act of 1926 (44 Stat. 101), as amended by Section 723(a) of the Revenue Act of 1932 (47 Stat. 272), as it read on February 1, 1937?

Was the vesting in petitioner, as a consolidated corporation, of the ownership of shares of stock in other corporations, owned by the constituent corporations, as aforesaid, a transfer of legal title to such shares of stock which resulted "wholly by operation of law" and thus not subject to tax, as provided in Article 35(r) of Treasury Regulations 71?

Since the vesting in petitioner, as a consolidated corporation, of the ownership of the rights, powers, interests, franchises and properties of the constituent corporations was effected by the provisions of the laws of the State of New York, particularly Section 89 of the Stock Corporation Law of New York, in the situation here presented, does the Federal documentary stamp tax statute here involved, by necessary implication make its operation dependent upon the law of the State of New York; and, if so, does the state law prevent the transaction from falling within the reach of the Federal taxing statute?

The Reasons Relied on For the Allowance of the Writ of Certiorari.

1. The Circuit Court of Appeals for the Second Circuit, in deciding this case, has decided an important question of Federal law which has not been, but should be, settled by this Court.

So far as we know, the applicability of the Federal documentary stamp tax statute to the vesting of the ownership of shares of stock which occurs as an incident to the statutory proceedings to form a consolidated corporation has not been determined by this Court.

As appears from its opinion, the court below purported to apply a dictum in the opinion of this Court in *Raybestos-Manhattan Inc.* v. *United States,* 296 U. S. 60. But the only question considered and decided in that case (and in the case of *Founders General Co.* v. *Hoey,* 300 U. S. 268, which followed the *Raybestos-Manhattan* case) was whether the carrying out of a plan of reorganization of a corporation whereby certificates for shares in a new corporation, issued as the consideration for the acquisition of the assets of an old corporation, were issued directly to and in the name of the holders of the shares of the stock of the old corporation, involved a tax on the transfer of the *right to receive* the new shares. The question here presented was not considered or decided in either the *Raybestos-Manhattan* case or the *Founders General* case.

The learned Circuit Court of Appeals for the Second Circuit erroneously stated that "a transfer by a New

Jersey consolidation has been held taxable", citing the *Raybestos-Manhattan* case.

Although Treasury Regulations 71, Article 34(r) include as an "example" of a taxable transfer the transfer of shares from a merged to a merging corporation upon the *merger* of one corporation into another (and where no new corporation is formed out of a constituent corporation), the Regulations have never included within such "examples" a vesting of ownership of shares through a statutory proceeding (such as is provided in the corporation laws of New York), whereby two or more existing corporations are *consolidated* to form a single, consolidated corporation. The effect of the decision of the Circuit Court of Appeals for the Second Circuit is to add to the Treasury Regulations a new "example" of a transaction which gives rise to a taxable transfer, but which the Treasury Department itself has never included in its Regulations.

So far as we know, the validity of the "example" in the case of a *merger,* as stated in Regulations 71, has never been considered by this Court.

In any event, we believe it is reasonable to assume that the Treasury Department was and is aware of the marked distinction between the situation where one corporation *acquires* the assets of another corporation by merger and that in which there is a *succession* by a new corporation to the corporate powers and the assets and liabilities of two constituent corporations by virtue of a statutory consolidation.

Unlike the statutes of some of the states, in New York the corporate proceedings necessary to effect a merger

differ substantially from those by which constituent corporations are consolidated.*

The distinction in New York was noted as late as July 15, 1938, in an opinion of Deputy Commissioner of Internal Revenue, D. Spencer Bliss, regarding the liability for Federal documentary stamp taxes under the provisions of Schedule A-8 of Title VIII of the Revenue Act of 1926, as amended by Section 725 of the Revenue Act of 1932, imposing a tax upon the sale of realty, wherein he said:

> "Under the consolidation procedure followed in New York there is no preliminary agreement by stockholders to sell, convey and dispose of the realty to the consolidated corporation such as is normally made in other States. In New York the stockholders merely vote for consolidation. The certificate of consolidation executed and filed with the Secretary of State brings into effect the New York laws relating to consolidation. These laws bring about a change in ownership in the realty. * * *
>
> "For the reasons indicated and particularly because of the unusual procedure prescribed in the laws of New York regarding the consolidation of corporations, it is the opinion of this office that the change in ownership of the realty * * * was not effected by means of a conveyance of realty sold and was not, therefore, subject to the stamp tax * * *." (See let-

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* Apparently no distinction is made between merger and consolidation under the laws of the states of Delaware, New Jersey, Maryland and Pennsylvania. Section 59, Delaware General Corporation Law; see also Section 105 of the New Jersey General Corporation Act, New Jersey Revised Statutes, Section 14: 12-2; and Sections 33 and 33½ of Article 23 of the Maryland Code, Edition of 1924 as amended, Maryland Laws of 1935, Chapter 551. See also *Koppers Coal and Transportation Co.* v. *United States, Raybestos-Manhattan, Inc.* v. *United States, and Helvering* v. *Metropolitan Edison Company*, discussed *infra*.

ter of Deputy Commissioner Bliss, dated July 15, 1938 addressed to Messrs. Whitman, Ransom, Coulson & Goetz, New York, N. Y.)

To extend the "example" stated in Article 34(r) of Treasury Regulations 71, describing as taxable a transfer resulting from a merger, to include transfers of stock incident to a consolidation of constituent corporations not only does violence to the provisions of the New York law, but also fails to note the distinctions between the procedure under New York law and that which prevails in other states, as noted in the letter of Deputy Commissioner Bliss.

Under the New York law, as it read on February 1, 1937, when the consolidation forming petitioner was completed, to effect a merger of one corporation into another (1) the merging corporation was required to own all (in the case of certain public utility corporations 95%) of the stock of the corporation to be merged, (2) the corporation to be merged had to be authorized to engage in business "similar or incidental" to the authorized business of the merging corporation and (3) the merger was effected solely by action of the Board of Directors of the merging corporation (Section 85, Stock Corporation Law of New York,* as in effect February 1, 1937). In the case of a consolidation, however, the statutes did not require either of the constituents to own any of the stock of any other constituent corporation, there was no requirement regarding similarity of businesses and the consolidation could only be accomplished with the consent or votes of the stockholders of the constituent corporations; no action by the directors of any of the constituent corporations was required (Section 86, Stock Corporation Law of New York, as it read February 1, 1937).**

* Printed in the Appendix beginning at page 32.

** Printed in the Appendix beginning at page 35.

Moreover, in the case of a merger of one existing corporation into another, it is only the shares of stock owned by the merged corporation which, in any event, could be subject to the documentary stamp tax. The effect of the decision below is that the consolidation of two or more constituent corporations into a single corporation creates a liability for the documentary stamp tax, not only as to the shares owned by one of the constituent corporations, but also to the shares owned by both or all of the other constituent corporations.

The court below completely ignored the distinctions (which presumably the draftsmen of the Treasury Regulations had in mind) between a "transfer" resulting through a merger, on the one hand, and the vesting of ownership resulting through consolidation proceedings, on the other hand.

If in the situation here presented, Mohawk Hudson Power Corporation had been merged into Niagara Hudson Power Corporation (constituent), in view of the "example" stated in Article 35(r) of Treasury Regulations 71, a stock transfer tax would have been claimed to be due only in respect of the shares in other corporations owned by Mohawk Hudson and no tax would have been claimed on the stocks owned by Niagara Hudson (constituent). The stipulated facts show that Niagara Hudson (constituent) was the holder of a larger number of shares in many more corporations than was Mohawk Hudson and that Niagara Hudson (constituent) owned 99% and a substantial amount of the outstanding preferred stock of Mohawk Hudson. (R. 59, 94-99)

A correct determination by this Court of the question here presented is, therefore, of the utmost importance in

order that it finally may be determined whether the selection of one of two available corporate proceedings may substantially affect the amount of Federal stock transfer taxes which may or may not be payable.

2. The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter.

In sustaining the liability for the documentary stamp tax the court below refused to hold that the Federal taxing statute by necessary implication makes its operation dependent upon state law and refused to accept and follow the decisions of the New York State courts which hold that such a "transfer" as here involved is one which results wholly by operation of law.

The court below held:

> "Decisions of state courts holding similar transfers not subject to a state documentary stamp tax because resulting 'by operation of law' [citing *Electric Bond & Share Co.* v. *State of New York,* 249 App. Div. 371, aff'd 274 N. Y. 625, and other cases in the New York State court] may be of persuasive value, but cannot be determinative as to what is a transfer under federal law" [citing *Burnet* v. *Harmel,* 287 U. S. 103, *Lyeth* v. *Hoey,* 305 U. S. 188, and its own decision in *Weil* v. *U. S.,* 115 F. (2d) 999].

Prior to the decision below the opposite view was taken by the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Merchants National Trust and Savings Bank,* 101 F. (2d) 399, where it was squarely held that the Federal documentary stamp tax by necessary implication makes its own operation dependent upon state law.

The Ninth Circuit Court said (at page 401):

> "The tax statute here involved by necessary implication makes its own operation dependent upon state law. Lyeth v. Hoey, 59 S. Ct. 155, 158 * * *. There is cited to us no federal law or statute providing for the method of transfer 'by operation of law' of a trust estate from one corporate trustee to another, where the trust business of one is sold to the other. The questions of whether legal title to this personal property has been transferred and whether the transfer was by operation of law necessarily depend for their answer upon state law."

That court affirmed the judgment of the district court which directed that a Federal documentary stamp tax of $1,019.37 with interest and costs be refunded to the taxpayer. There, pursuant to the provisions of California statutes, the trust department of a bank and the shares of stocks which the bank held as trustee under various trusts were sold and conveyed to another bank with the approval of the State Superintendent of Banks.

After reviewing the decisions of this Court (including *Lang* v. *Commissioner*, 304 U. S. 264, and *Lyeth* v. *Hoey*, 305 U. S. 188), it was said in the opinion of the Ninth Circuit (101 F. (2d) 399, at page 401):

> "We note the language of Lyeth v. Hoey, supra, concerning the desire for uniformity throughout the states in the administration of federal taxation. We do not consider this case overrules Lang v. Commissioner, supra, and that the Washington law on community property is to be disregarded to the end that there shall be no difference in federal estate taxation between community property and common law states. Likewise, here, one state may by operation of law make such a transfer between corporate trustees, as

> is here sought to be taxed, and another state may not. Uniformity for all the states is no more possible than is it for the estate tax."

The Ninth Circuit Court concluded that under California law the transfer by one trust company of the shares held in trust to the acquiring bank was by operation of law and directed judgment for the taxpayer.

In the course of its opinion the Ninth Circuit Court also referred to the decisions in the New York courts construing the stock transfer tax imposed pursuant to the statutes of New York (Section 270, Tax Law of New York), the provisions of which are substantially identical with those of the Federal statute, and indicated approval of those decisions.

In June 1937 the highest appellate court of New York had unanimously affirmed a decision of the Appellate Division of the New York Supreme Court, Third Department, holding that there is no liability for stock transfer stamp taxes under the New York statute where, as here, the ownership of shares of stock previously owned by the constituent corporations vests through consolidation of constituent corporations in a new consolidated corporation. *Electric Bond & Share Co.* v. *State of New York,* 249 App. Div. 371, aff'd 274 N. Y. 625. (That decision followed earlier decisions of the New York courts in *Rockefeller Foundation* v. *State of New York,* 144 Misc. 460; *Phelps-Stokes Estates* v. *Nixon,* 222 N. Y. 93.)

The Ninth Circuit Court further refused to apply the dictum in the opinion of this Court in *Raybestos-Manhattan, Inc.* v. *U. S., supra,* (discussed *infra* at page 18) saying (at page 403):

> "* * * This dictum has no relevance to a statutory transfer by operation of law where, the instant before the law makes the transfer, the title to the stocks is in one trustee and the instant after it is in another. Here it is stipulated that this is the transfer sought to be taxed."

The Circuit Court of Appeals for the Second Circuit, in deciding the case at bar, referred to the decision of the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Merchants Nat. Trust & Savings Bank, supra,* and said:

> "* * * whatever may be said as to that decision on its facts, the record here shows that this transfer was not wholly by operation of law."

Reference was also made below to the decisions in the New York state courts mentioned above, and while admitting that such decisions "may be of persuasive value" the court below held that they "cannot be determinative as to what is a transfer under federal law" (citing *Burnet* v. *Harmel,* 287 U. S. 103; *Lyeth* v. *Hoey, supra,* 305 U. S. 188).

The court below also cited its own decision in *Weil* v. *U. S.,* 115 F. (2d) 999, decided December 16, 1940, where it was held that there was liability for the Federal documentary stamp tax on the sale or transfer of bonds under Section 800, Schedule A-9 of Title VIII of the Revenue Act of 1926, 44 Stat. 101, as amended by Section 724(a) of the Revenue Act of 1932, 47 Stat. 274, 26 U. S. C. A. Internal Revenue Acts, page 297, upon a conveyance of the bonds to new trustees by the Mortgage Commission of the State of New York, pursuant to provisions of state law which

required, as conditions of such conveyance, authorization by the affirmative votes of a majority of the beneficial owners of the bonds and approval of the state court (c. 745, L. of 1933, commonly called "The Schackno Act").

In addition, the court below also relied upon the decision of the Circuit Court of Appeals for the Third Circuit in *Koppers Coal & Transportation Co.* v. *United States,* 107 F. (2d) 706, decided November 15, 1939, where the transfer of shares of stock by a merged corporation to a merging corporation, pursuant to the Corporation Laws of Delaware, was held to be taxable under the Federal statute.

In the *Koppers* case and in the *Weil* case (as well as in the opinion below in the case at bar) it appears that the Second and Third Circuits have attempted to apply to "transfers" resulting from mergers or consolidations of constituent corporations a dictum of this Court in the *Raybestos-Manhattan* case, *supra,* 296 U. S. 60, where this Court said at page 62:

> "The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. * * * While the statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another."

In the *Merchant's Nat. Trust & Savings Bank* case, as noted, the Ninth Circuit held that such dictum "has no relevance to a statutory transfer by operation of law." *

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* 101 F. (2d) 399, at page 403.

The dictum, we believe, can have no application in the situation here presented, because, as a matter of law the constituent corporations Niagara Hudson and Mohawk Hudson ceased to exist at the moment the petitioner came into existence as a consolidated corporation.* Therefore, no ownership of the stocks could be "relinquished" by the constituent corporations as "transferors" and thereby "vested" in the petitioner as the "transferee".

Furthermore, as noted above, the only question decided by this Court in the *Raybestos-Manhattan* case was whether a transfer of a *right to receive* shares was taxable where the certificates for shares in a new corporation, which was the consideration for the acquisition by the new corporation of the business properties and assets of the old corporation, were issued directly to the stockholders of the old corporation. As noted above, the same question was also considered by this Court in *Founders General Co.* v. *Hoey, supra,* 300 U. S. 268, where the decision in the *Raybestos-Manhattan* case was followed.

Since the court below attempted to apply the dictum of this Court in the *Raybestos-Manhattan* case and since the Ninth Circuit in the *Merchants Nat. Trust & Savings Bank* case expressly held that such dictum has "no relevance", there is a sharp conflict in the Circuit Courts in regard to the applicability of what appears to have been the most recent statement by this Court regarding the Federal stock transfer taxing statute.

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* New York Stock Corporation Law, Sections 88, 89 and 90; *People* v. *N. Y., C. & St. L. R. R. Co.,* 129 N. Y. 474; *Miner* v. *N. Y. C. & H. R. R. Co.,* 123 N. Y. 242; *People ex rel. New York Phonograph Co.* v. *Rice,* 57 Hun 486, aff'd on opinion below 128 N. Y. 591; see also *Electric Bond & Share Co.* v. *State of New York,* 249 App. Div. 371, at page 372.

There are also conflicting holdings, as noted above, in those Circuit Courts of Appeals (and possibly in the Third Circuit as well *) on the question whether the Federal documentary stamp tax statute by necessary implication makes its operation dependent upon state law in situations where ownership of stocks vests in a new or different corporation through statutory proceedings taken pursuant to the laws of the state where such corporations are incorporated.

It is therefore respectfully submitted that this Court should resolve the conflicts in the holdings of the aforesaid Circuit Courts of Appeal.

3. The Circuit Court of Appeals for the Second Circuit has decided a Federal question in a way which is probably in conflict with the applicable decisions of this Court.

In addition to the conflict in regard to the application and interpretation of the dictum in the *Raybestos-Manhattan* case, it also appears that the decision below, sought to be reviewed, conflicts with the applicable rules stated by this Court in its decision in *Helvering* v. *Metropolitan Edison Company,* 306 U. S. 522, decided April 3, 1939.

In that case this Court clearly indicated that whether there is a sale or transfer of property for the purpose of determining liability for Federal income taxes (where corporate proceedings were taken under Pennsylvania statutes to merge or consolidate constituent corporations into a new corporation), is to be determined according to state law. There it was held that a corporation formed by merger or consolidation of predecessor corporations, pur-

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* *Koppers* v. *United States,* 107 F. (2d) 706.

suant to the laws of Pennsylvania regulating the merger or consolidation of constituent corporations, may deduct unamortized discount and expenses with respect to bonds issued by the predecessor corporatoins in determining net income of the successor (consolidated) corporation, and that statutory proceedings to merge or consolidate constituent corporations do not constitute a "sale" of the properties of such constituent corporations in the generally accepted meaning of the word.

In discussing the proceedings taken under the Pennsylvania statutes for the merger or consolidation of the predecessor corporations, the original issuers of the bonds, this Court said (306 U. S. 522, at pages 527 and 528):

> "* * * The Act of May 3, 1909, permits what it terms a merger but what is in truth a consolidation to be effected by a joint agreement of two or more corporations approved by the stockholders setting forth the terms and conditions of the merger and consolidation and providing for the organization of a new corporation to which the franchises and property of the consolidating corporations are to be transferred. This act contemplates the issue of letters patent to the consolidated corporation, and the issue of new stock by it, in lieu of that of the old. The procedure under the Act of 1874 has repeatedly been referred to in the decisions of the Supreme Court of the Commonwealth as the 'short form' and that under the Act of 1909 as the 'long form' of merger.
>
> "Inasmuch as the transfer of the franchises and assets is authorized by statute, it seems reasonably clear that the transferee is, as matter of law, liable for the obligation of the transferor. The cases indicate that this is so.
>
> * * *
>
> "We are of opinion that a transfer without valuable consideration, with the intent that the trans-

> feror shall, as the statute provides, cease to exist, made in accordance with the statute, has all the elements of a merger and comes within the principle that the corporate personality of the transferor is drowned in that of the transferee. It results that the continuing corporation may deduct unamortized bond discount and expense in respect of the obligations of the transferring affiliate."

The question in the *Metropolitan Edison Company* case was said to be "solely one respecting the law of Pennsylvania" (306 U. S. 522, at page 527), i. e., whether the statutory proceedings under the Pennsylvania statutes whereby constituent corporations were merged (or consolidated) into a new corporation was a "mere sale" of the assets of the existing corporations to the new corporation. This Court held that, as a matter of state law, there was no "sale", because the transfer was without valuable consideration and that it was made with the intent that the transferor should cease to exist, as provided by the state statute. As a further reason for holding that there was no "sale" of the assets of the constituent corporations, this Court found that the case came within the principle that "the corporate personality of the transferor is drowned in that of the transferee".

Applying the same reasoning and the same rule to the case at bar, we believe this Court will also find that under New York law there is no "sale" of assets where constituent corporations are consolidated into a new, single corporation which succeeds to all the rights, powers, interests, franchises, businesses, properties and assets of every character previously owned by the constituent corporations, including shares of stock in other corporations,

and that it necessarily follows that there is no "transfer" of such stocks, as a matter of state law. Upon such a process of reasoning (which the court below rejected as a "highly formalistic and arbitrary analysis of the consolidation"), it is respectfully submitted that there should be no liability for the Federal documentary stamp tax in respect of the vesting in the consolidated corporation of the ownership of such shares of stock.

In the case at bar it clearly appears that the vesting of the ownership of the shares of stock in other corporations resulted wholly from the operation of the provisions of Section 89 of the Stock Corporation Law. The highest appellate court of the State of New York has squarely held (in deciding whether liability arises for a documentary stamp tax under the New York statute) that the vesting in a consolidated corporation of shares previously owned by constituent corporations results wholly by operation of law.

Electric Bond & Share Co. v. *State of New York, supra*, 249 App. Div. 371, aff'd 274 N. Y. 625.

In that case, as previously noted, the New York Court of Appeals affirmed the decision of the Appellate Division of the New York Supreme Court, Third Department, where it was said (249 App. Div. 371, at page 372):

> "The effect of the consolidation was to dissolve all the constituent corporations, terminate their existence in toto except for certain limited purposes and to create a new corporate entity out of the component bodies." [Citing Stock Corporation Law, §§ 88, 89, 90; *People* v. *N. Y. C. & St. L. R. R. Co.*, 129 N. Y. 474; *Miner* v. *N. Y. C. & H. R. R. R. Co.*, 123 id. 242; *People*

ex rel. New York Phonograph Co. v. *Rice*, 57 Hun, 486; affd. on opinion below 128 N. Y. 591.]

and at page 373:

> "Within the reasoning of *Phelps-Stokes Estates* v. *Nixon* (222 N. Y. 93) it would seem that such tax relates to a sale or transfer within the ordinarily accepted meaning of these terms, and does not apply to a transfer occurring merely by operation of law. We think the court below properly held that the transfers in question are not taxable under said section 270."

It has also been held by this Court that the state law must determine whether a particular transaction creates liability for a Federal tax when the Federal taxing act by express language or "by necessary implication makes its own operation dependent upon state law."

> *Burnet* v. *Harmel, supra,* 287 U. S. 103;
> *Lyeth* v. *Hoey, supra,* 305 U. S. 188.

Therefore, since the change of the ownership of the shares of stock here involved was effected solely by the state law, applying the rules stated by this Court, it follows that, in the circumstances here presented, the operation of the Federal taxing statute, by necessary implication, is dependent upon the state law; and applying that state law, there should be no liability for the tax, because the "transfer" of ownership of the stocks was effected solely "by operation of law", that is Section 89 of the Stock Corporation Law of New York.

Such was the view taken by the Circuit Court of Appeals in the Ninth Circuit in the *Merchants Nat. Trust & Savings Bank* case and which, as shown, was rejected by

the Circuit Court of Appeals for the Second Circuit in the case at bar. The probable conflict, therefore, with the applicable decisions of this Court warrants a review of the decision by this Court.

Prayer.

For the reasons stated, therefore, your petitioner respectfully prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case to the end that this case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may be proper.

Dated: New York, New York
March 25, 1941

Respectfully submitted,

NIAGARA HUDSON POWER CORPORATION,
Petitioner

By HORACE R. LAMB
Its Attorney

RANDALL J. LE BOEUF, JR.,
CRAIGH LEONARD,
of counsel.

Opinion.

Before:

SWAN, CHASE and CLARK,

Circuit Judges.

CLARK, *Circuit Judge*:

The question here presented is whether or not a corporation resulting from a consolidation of two existing corporations under §86 of the New York Stock Corporation Law is liable for the federal documentary stamp tax levied by Section 800, Schedule A-3, of Title VIII of the Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101, as amended by Section 723 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 272, 26 U. S. C. A. Int. Rev. Acts, page 290, in respect of stocks received by it from the constituent corporations.

Section 800, Schedule A-3, imposes the tax on "all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any * * * shares or certificates." U. S. Treas. Reg. 71 (1932 Ed.) Art. 35(r), however, declares transfers "which result wholly by operation of law," i.e., "those which the law itself will effect without any voluntary act of the parties," not to be subject to the tax.

This consolidation took place February 1, 1937, upon the filing with the Secretary of State of a certificate of consolidation signed by two officers of each of the two constituent corporations, so authorized by a two-thirds majority of the stockholders of each of the constituents, voting at meetings called for the purpose by their respective boards of directors. See §86, New York Stock Corporation Law. Thereupon the ownership of certain stocks, until then in the

constituents, became vested in the plaintiff, and on October 21, 1938, plaintiff paid a tax of $260,969.04 in respect thereof, which it has thus far unsuccessfully sought to have refunded.

We think that the opinion of the district court (34 F. Supp. 302) clearly and adequately answers the contention that this transfer should be exempt under U. S. Treas. Reg. 71, Art. 35(r), as having resulted "wholly by operation of law." Indeed, this court more lately has rejected the same contention, for similar reasons, in *Weil* v. *United States,* 2 Cir., F. 2d , where the transfer of bonds to trustees from the Mortgage Commission of the State of New York was authorized by the affirmative vote of the proper majority of certificate holders. A transfer by a New Jersey consolidation has been held taxable in spite of this objection (*Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60, 56 S. Ct. 63, 80 L. Ed. 44, 102 A. L. R. 111), and also a transfer by a Delaware merger (*Koppers Coal & Transportation Co.* v. *United States,* 3 Cir. 107 F. 2d. 706); nor can these cases be distinguished as to the voluntary nature of the transfer, since the consolidation of plaintiff's constituents was brought about by the resolutions of their directors and votes of their stockholders. In *United States* v. *Merchants Nat. Trust & Savings Bank,* 9 Cir., 101 F. 2d 399, the court held that, where a bank sold its trust department to another bank, no stamp taxes were required upon the transfer of the individual trust securities to the new bank as successor trustee; but, as we said in the *Weil* case, whatever may be said as to that decision on its facts, the record here shows that this transfer was not wholly by operation of law.

Decisions of the state courts holding similar transfers not subject to a state documentary stamp tax because resulting "by operation of law" (*Electric Bond & Share Co.* v. *State of New York,* 249 App. Div. 371, 293 N. Y. S. 175, affirmed 274 N. Y. 625, 10 N. E. 2d 583; *Rockefeller Foundation* v. *State of New York,* 144 Misc. 460, 258 N. Y. S. 812) may be of persuasive value, but cannot be determinative as to what is a transfer under federal law. *Burnet* v. *Harmel,* 287 U. S. 103, 53 S. Ct. 74, 77 L. Ed. 199; *Lyeth* v. *Hoey,* 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119, 119 A. L. R. 410; *Weil* v. *United States, supra.*

Plaintiff seeks to avoid the tax not only under the exemption of Art. 35(r), but also on the ground that no transfer occurred at all, so that the scope of Section 800 is not extended to this situation. For the purpose of this argument, plaintiff makes a highly formalistic and arbitrary analysis of the consolidation to the effect that the constituent corporations' stockholders voted merely for a consolidation, and that New York Stock Corporation Law, §89, operated of itself to "vest" the property of the constituents in the plaintiff, not to "transfer" it. Indeed, it is said, a transfer is inconceivable, for there were no instruments of transfer, nor was there any moment of time at which a transferor and a transferee were co-existent. But in legal jargon a change of ownership, terminating rights and other relations in one entity and creating them in another, is the essence of "transfer," 29 Yale L. J. 91, 93, 429, 29 Harv. L. Rev. 816, 817; and the *Weil, Raybestos-Manhattan,* and *Koppers Coal* cases all presuppose it to be so without regard to these suggested difficulties. In fact, *Welch* v. *Kerckhoff,* 9 Cir., 84 F. 2d 295, 106 A. L. R. 1434, held a bequest of stock to be a transfer subject to this tax. Section

89 itself declares that on the filing of the certificate, property shall be deemed "to be transferred to and vested in such new corporation, without further act or deed."

There is no reason why the language of the federal Act should be restricted to an unusual meaning. A consolidation is more than a change of form; it definitely changes stockholders' interests in a business, often most extensively, and more than does a merger (as under New York Stock Corporation Law, §85), which is given as an example of a transfer subject to the tax in U. S. Treas. Reg. 71, Art. 34(r). Further, unless the taxing statute clearly requires it, formal differences in state laws relating to consolidations and mergers should not be made the basis of discrimination in the assessment of federal taxes.

Affirmed.

APPENDIX.

THE STATUTES.

Schedule A-3 of the Revenue Act of 1926, as amended, as in effect February 1, 1937, imposes a documentary stamp tax:

> "On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares of certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 4 cents until July 1, 1937, and 2 cents thereafter, and where such shares or certificates are without par or face value, the tax shall be 4 cents until July 1, 1937, and 2 cents thereafter, on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share as the case may be): *Provided,* That in case the selling price, if any, is $20 or more per share the above rate shall be 5 cents instead of 4 cents until July 1, 1937: *Provided further,* That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited nor upon the return of stock loaned; *Provided further,* That the tax shall not be imposed

upon deliveries or transfers to a broker or his registered nominee for sale, nor upon deliveries or transfers by a broker or his registered nominee to a customer for whom and upon whose order the broker has purchased same, nor upon deliveries or transfers by a purchasing broker to his registered nominee if the shares or certificates so delivered or transferred are to be held by such nominee for the same purpose as if held by the broker, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further,* That the tax shall not be imposed upon deliveries or transfers from a fiduciary to a nominee of such fiduciary, or from one nominee of such fiduciary to another, if such shares or certificates continue to be held by such nominee for the same purpose for which they would be held if retained by such fiduciary, or from the nominee to such fiduciary, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further,* That in case of sale where the evidence of transfer is shown only by the books of the corporation or other organization the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock,

share, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both: *Provided further*, That as used in this section the term 'registered nominee' shall mean any person registered with the collector of internal revenue in accordance with such rules and regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall prescribe."

Section 85 of the Stock Corporation Law of the State of New York, as in effect February 1, 1937, relating to "Mergers", provides:

"1. Any domestic stock corporation or any foreign stock corporation authorized to do business in this state owning all the stock of any other domestic stock corporation, authorized to engage in business similar or incidental to the business which the possessor corporation is authorized to engage in, and any domestic stock corporation owning all the stock of any foreign stock corporation authorized to do business in this state and authorized to engage in business similar or incidental to the business which the possessor corporation is authorized to engage in, may file in the office of the secretary of state a certificate of such ownership, in its name and under its corporate seal, signed by its president or a vice-president and its secretary or treasurer, and setting forth a copy of the resolution of its board of directors to merge such other corporation, and to assume all of its obligations, and the date of the adoption thereof. However any domestic gas corporation, electric corporation or gas and electric corporation owning at least ninety-five per centum of the outstanding shares of each class of stock of any

other domestic gas corporation, electric corporation or gas and electric corporation engaged in business similar or incidental to the business which the possessor corporation is authorized to engage in, may file in the office of the secretary of state a certificate of such ownership as above set forth, provided, however, that in case the possessor corporation shall not own all the outstanding stock of the other corporation to be merged, the resolution of the board of directors of the possessor corporation shall state the terms and conditions of the merger, including the securities, cash or other consideration to be issued, paid or delivered by the possessor corporation upon surrender of each share of the merged corporation not owned by the possessor corporation, and provided further that prior to the filing of the certificate in the office of the secretary of state, the possessor corporation shall mail to each stockholder of record of the corporation to be merged a copy of such resolution and notice of adoption thereof, and the certificate shall state that the resolution, and notice have been so mailed. Upon the filing of such certificate, all of the estate, property, rights, privileges and franchises of such other corporation, shall vest in and be held and enjoyed by such possessor corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by such possessor corporation, and, except as provided in subdivision three of this section, in its name, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof. The possessor corporation shall not thereby acquire power to engage in any business or to exercise any right, privilege or franchise of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which such possessor corporation is organized. For the purpose of this subdivi-

sion the word 'any domestic gas corporation, electric corporation or gas and electric corporation' shall be deemed to mean any corporation defined in section ten of article two of the transportation corporations law, or made subject to the provisions of said article two of said law by section five of article one thereof.

"2. The possessor corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation and shall be liable in the same manner as if it had itself incurred such liabilities and obligations.

"3. If the possessor is a domestic corporation it may relinquish its corporate name and assume in place thereof the name of the merged corporation by including a provision to that effect in the resolution of merger adopted by the directors and set forth in the certificate of ownership, and upon the filing of such certificate the change of name shall be complete with the same force and effect and subject to the same conditions and consequences as if such change had been accomplished by proceedings under the general corporation law. No corporation shall change its name under this section unless the name assumed contains some word or abbreviation clearly indicating that it is a corporation.

"4. Any bridge corporation may be merged under this section with any railroad corporation which shall have acquired the right by contract to run its cars over the bridge of such bridge corporation.

"5. If either the possessor corporation or the corporation sought to be merged is subject to the jurisdiction of the public service commission, such merger shall not become effective unless and until such commission shall approve, and the approval of the merger by such commission shall be endorsed on or annexed to the certificate of merger before filing, and the pub-

lic service commission is directed to make such investigations and/or hold such public hearings as is in its opinion necessary or desirable to enable it to determine if such approval should be granted.

"6. Any omnibus corporation may, with the consent of the public service commission, merge with any railroad corporation, or any railroad corporation may, with the consent of the public service commission, merge with any omnibus corporation, under this subdivision, provided such railroad corporation shall have substituted stages, buses or motor vehicles for cars or trains upon tracks on any portion of its route in accordance with section fifty-a of the public service law. No consent shall be given by the commission to any such merger in accordance with this subdivision unless it shall have been shown, after public hearing, that such merger is in the public interest.

"7. In the event all of the stock of the corporation proposed to be merged by a possessor is not owned by such possessor corporation, any stockholder of the corporation so to be merged may, within twenty days after the filing of the certificate with the secretary of state, object to such merger and demand payment for his stock. Such objection and demand must be in writing and filed with the possessor corporation. Thereupon such stockholder and the possessor corporation shall have the right, subject to the conditions and provisions of section twenty-one, to have such stock appraised and paid for as provided in said section. As amended L. 1924, c. 441, § 15; L. 1925, c. 649; L. 1935, c. 398; L. 1936, c. 778, §§ 1-3; L. 1937, c. 815, eff. June 1, 1937."

Section 86 of the Stock Corporation Law of the State of New York as in effect February 1, 1937, relating to "Consolidations", provides:

"Any two or more stock corporations, organized under the laws of this state for the purpose of carry-

ing on any kind or kinds of business which a corporation organized under article two of this chapter might carry on may be consolidated into a single corporation by the filing of a certificate which shall be entitled and endorsed 'Certificate of consolidation forming ....., pursuant to section eighty-six of the stock corporation law' (the blank space being filled in with the name of the corporation formed by the consolidation) and which shall state:

"1. The name of each corporation to be included in the consolidation, and the date of filing of its certificate of incorporation in the department of state, or, if any such corporation is created by a special law and has no certificate of incorporation, the chapter number and year of passage of such law.

"2. The total number of shares which each of the corporations to be included in the consolidation is authorized to issue, the number thereof which have a par value, if any, together with the par value of each, and the number thereof which are without par value.

"3. The name of the new corporation.

"4. Either the amount of the capital stock of the new corporation and the number and par value of the shares of which it is to consist, or, if the corporation is to issue shares without par value, the statements required by section twelve. If the shares are to be classified, the number of shares to be included in each class and all of the designations, preferences, privileges and voting powers of the shares of each class, and the restrictions or qualifications thereof.

"If any class of stock which is preferred as to dividends or assets is to be issued in series as provided by section eleven, either (a) the designations, preferences, privileges and voting powers of the shares of the first series of such class, and the restrictions or qualifications thereof, and that the board

of directors is authorized to fix from time to time before issuance the designations, preferences, privileges and voting powers of the shares of each subsequent series of such class, and the restrictions or qualifications thereof, or (b) that the board of directors is authorized to fix from time to time before issuance the designations, preferences, privileges and voting powers of the shares of each series of such class, and the restrictions or qualifications thereof.

"5. The city, village or town and the county, within the state, in which the office of the corporation is to be located, and the address within or without the state, to which the secretary of state shall mail a copy of process in any action or proceeding against the corporation which may be served upon him.

"6. Its duration.

"7. The number of its directors, or that the number of directors shall be not less than a stated minimum nor more than a stated maximum. In either case the number of directors shall be not less than three.

"8. The names and postoffice addresses of the persons who are to be its directors until the first annual meeting of its stockholders, and if such address shall be in a city, the street and number or other particular description thereof. The number of the directors so named must be the number stated pursuant to the last preceding subdivision of this section if a definite number be stated, or, if an indefinite number be provided for, not less than the minimum number.

"9. The terms and conditions of the consolidation, if any; the mode of carrying the same into effect, and the manner of distributing the shares of the new corporation among the stockholders of the constituent corporations.

"Such certificate shall be either:

"a. Subscribed and acknowledged, in person or by proxy, by the holders of record of all the outstanding shares of each constituent corporation entitled to vote thereon, and shall have annexed an affidavit by the secretary or an assistant secretary of each corporation that the persons who have executed the certificate, in person or by proxy, include the holders of record of all of the outstanding shares of such corporation entitled to vote thereon; or

"b. Subscribed and acknowledged by the president or a vice-president and the secretary or an assistant secretary of each constituent corporation, who shall make and annex an affidavit stating that they have been authorized to execute and file such certificate by the votes, cast in person or by proxy, of the holders of record of two-thirds of the outstanding shares of such corporation entitled to vote thereon, and that such votes were cast at a stockholders' meeting held upon notice as prescribed in section forty-five of the stock corporation law to every stockholder of record of the corporation entitled to vote thereon, and the date of such meeting.

"Such certificate shall be filed in the department of state and the secretary of state shall make, certify and transmit a copy thereof to the clerk of the county in which the office of the new corporation is to be located, which copy shall be filed by such clerk. The corporation shall cause a certified copy or a duplicate original of such certificate to be filed in the office of the clerk of each county in which a certificate of incorporation of a constituent corporation is filed and in the office of the clerk or register of each county of this state in which real property of a constituent corporation is situated.

"If such certificate contains a statement in conformity with pargraph (B) of subdivision four of section twelve, the amount of the consideration re-

ceived by the new corporation for the issuance of such of its shares without par value as are distributed in place of previously issued and outstanding shares with par value of the constituent corporations, shall be deemed to be the amount of the par value of such previously issued and outstanding shares, or if the actual value of such shares be less than their par value the consideration may be stated to be their actual value, and the amount of the consideration received by the new corporation for the issuance of such of its shares without par value as are distributed in place of previously issued and outstanding shares without par value of the constituent corporations shall be deemed to be the amount of the capital of the constituent corporations represented by such outstanding shares without par value for which the shares of the new corporation without par value are distributed.

"The aggregate par value of the shares with a par value of the new corporation distributed in place of previously issued and outstanding shares of the constituent corporations shall not exceed the aggregate value of the properties, franchises and rights of such constituent corporations.

"Any excess in the amount of the assets of the new corporation over the amount of its liabilities, including capital, or capital stock as the case may be, at the date of consolidation, may be deemed to be surplus of the new corporation.

"10. That the secretary of state is designated as the agent of the corporation upon whom process in any action or proceding against it may be served."

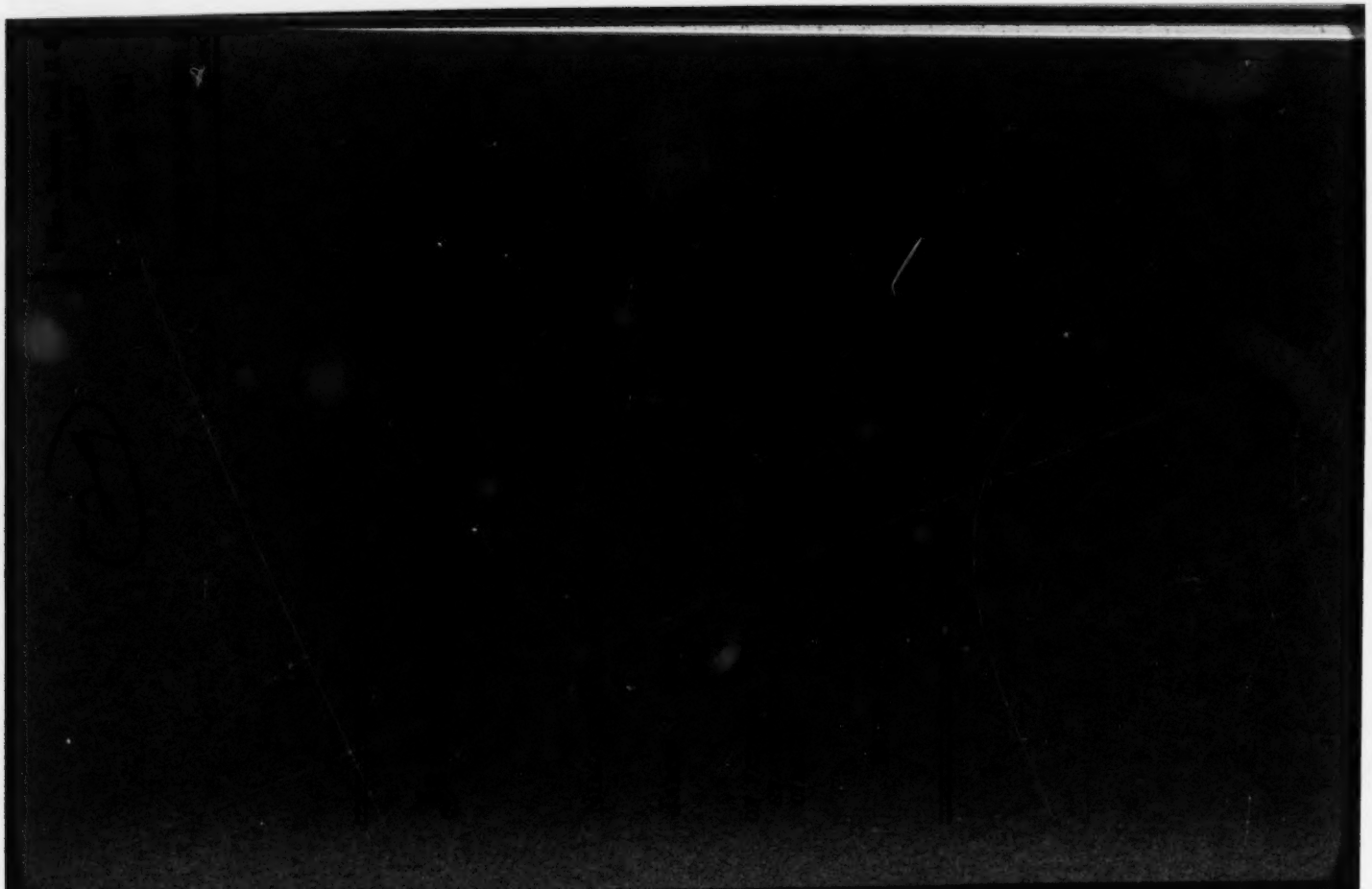
Section 88 of the Stock Corporation Law of the State of New York as in effect February 1, 1937, which defines the "Powers of Consolidated Corporations", provides:

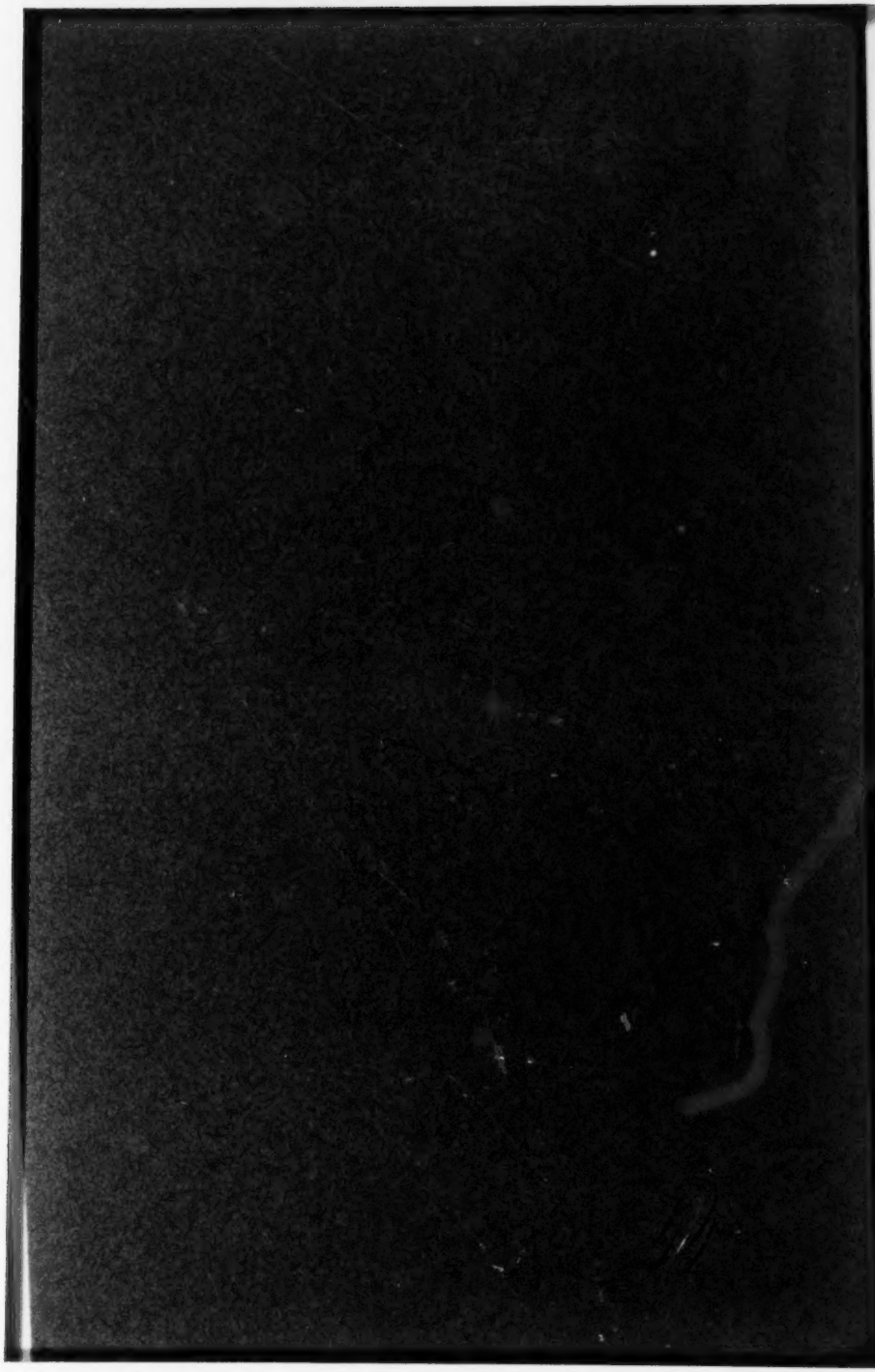
"Such new corporation in addition to the general powers of corporations shall enjoy the rights, fran-

chises and privileges possessed by each of the corporations so consolidated, subject to the restrictions, liabilities, duties and provisions contained in this chapter, and may prosecute or carry on any kind of business which any of the consolidating corporations was authorized by law to conduct."

Section 89 of the Stock Corporation Law of the State of New York as in effect February 1, 1937, which defines the rights and properties that shall rest in a consolidated corporation, provides:

"Upon the filing of such certificate of consolidation in the office of the secretary of state all the rights, privileges, franchises and interests of each of the constituent corporations, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property and every other interest shall be as effectually the property of the new corporation as they were of the constituent corporations, and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such constituent corporations, shall not be deemed to revert or be in any way impaired by reason of the consolidation, but shall be vested in the new corporation."





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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 871

NIAGARA HUDSON POWER CORPORATION, PETITIONER

v.

JAMES J. HOEY, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 83–87) is reported in 34 F. Supp. 302. The opinion of the Circuit Court of Appeals (R. 94–96) is reported in 117 F. (2d) 414.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 19, 1941 (R. 97). The petition for writ of certiorari was filed March 26, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a corporation resulting from a consolidation of two existing corporations under Section 86 of the New York Stock Corporation Law is liable for the federal documentary stamp tax levied by Section 800, Schedule A–3, of Title VIII of the Revenue Act of 1926, as amended, upon the acquisition of the stocks owned by the constituent companies.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * the several taxes specified in such schedule. * * *.
>
> SCHEDULE A.—STAMP TAXES
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> 3. (As amended by Section 723 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and the Act of June 29, 1936, c. 865, 49 Stat. 2029.) On all sales, or agreements to sell, or memoranda of sales or deliveries of, or

transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 4 cents until July 1, 1937, and 2 cents thereafter, and where such shares or certificates are without par or face value, the tax shall be 4 cents until July 1, 1937, and 2 cents thereafter, on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share as the case may be). * * *.

Treasury Regulations 71 (1932 ed.):

ART. 34. *Sales or transfers subject to tax.*—The following are examples of transactions subject to the tax:

* * * * *

(r) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corpora-

tion, such a transfer being effected by the act of the parties and not wholly by operation of law.

* * * * *

ART. 35. *Sales or transfers not subject to tax.*—The following are examples of transactions not subject to the tax:

* * * * *

(r) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

* * * * *

STATEMENT

The facts, which were stipulated (R. 17–81), may be summarized as follows:

The petitioner was formed on February 1, 1937, pursuant to Section 86 of the Stock Corporation Law of New York, by the consolidation of two corporations, Mohawk Hudson Power Corporation, and another which bore the same name as petitioner, and is therefore referred to herein as "Niagara Hudson Power Corporation (constituent)" (R. 18).

The consolidation was effected by the following procedure: A proposal to consolidate the constituent corporations, in accordance with a plan which had already been formulated, was made at a meet-

ing of the board of directors of Niagara Hudson Power Corporation (constituent) held on December 18, 1936. A certificate of consolidation containing all of the terms, conditions and provisions of the proposed consolidation was presented to the meeting, and the board of directors approved the plan and recommended it to the stockholders of the corporation. The board also directed the secretary to call a special meeting of the stockholders on January 29, 1937, to take action on the plan, and directed the officers to give notice to the stockholders of the meeting, and to secure the approval of the Public Service Commission of New York State for the consummation of the consolidation (R. 20–21, 34–45).

Similar action was taken at a meeting of the board of directors of Mohawk Hudson Power Corporation held on the same date (R. 22–23, 57–68).

Pursuant to the action taken at the meeting of its board of directors, Niagara Hudson Power Corporation (constituent) sent to its stockholders a circular letter dated December 22, 1936, advising them of the proposed consolidation and the terms thereof, together with a notice of the stockholders' meeting to be held on January 29, 1937 (R. 21).

A similar circular letter dated December 22, 1936, was sent by Mohawk Hudson Power Corporation to its stockholders, together with a notice of a stockholders' meeting to be held on January 29, 1937 (R. 24).

The stockholders' meeting of Niagara Hudson Power Corporation (constituent) was held on January 29, 1937, but no action was taken until the convening of the adjourned meeting on January 30, 1937. At this meeting the proposed plan of consolidation was considered, and was approved by the holders of more than two-thirds of the voting stock of the corporation. Further action was taken authorizing the officers of the corporation to perform the acts necessary and proper to carry the consolidation into effect, including the execution and filing of the certificate of consolidation in the Department of State of New York (R. 21–22, 48–56).

Similar meetings of the stockholders of Mohawk Hudson Power Corporation were held on January 29 and January 30, 1937, at which similar action was taken (R. 24–25, 71–80).

Pursuant to the authority granted at the stockholders' meetings of the two constituent corporations, the certificate of consolidation, duly executed by the corporate officers and accompanied by their appropriate affidavits, was filed with the Secretary of State of New York on February 1, 1937 (R. 26).

At the first meeting of the board of directors of petitioner on February 1, 1937, the directors authorized the issuance of certificates for the petitioner's capital stock in exchange for certificates of the capital stock of the constituent corporations, and appointed agents to receive the old certificates

for cancellation and to issue new certificates representing capital stock in petitioner in exchange therefor (R. 26–27).

Niagara Hudson Power Corporation (constituent) had kept certificates representing stocks in other corporations which it owned prior to the consolidation in a safe deposit box. After the consolidation, and at the first meeting of petitioner's board of directors on February 1, 1937, certain of its officers were authorized to have access to the safe deposit box containing the securities mentioned (R. 26–27). The certificates for stocks in other corporations held by Mohawk Hudson Power Corporation prior to the consolidation were shipped on February 3, 1937, to petitioner and were deposited by it in the same safe deposit box (R. 28–29).

Through the consolidation petitioner acquired title to all of the assets, including a large amount of capital stocks referred to above (R. 32–33), held by the constituent corporations. Upon the transfer to petitioner of these stocks, the Commissioner of Internal Revenue assessed a tax under Schedule A–3, Title VIII of the Revenue Act of 1926, as amended, *supra,* in the sum of $260,960.04 (R. 29). Petitioner paid this tax, filed a claim for refund which was rejected, and then commenced this suit (R. 29–30). The District Court sustained the Commissioner (R. 87–88) and the court below affirmed (R. 97).

ARGUMENT

1. The court below correctly held that the transfer of the stocks owned by the constituent corporations to the petitioner was subject to the stamp tax imposed by Section 800, Schedule A–3, Title VIII of the Revenue Act of 1926, as amended, *supra*. The broad scope of this statute was recognized in *Provost* v. *United States*, 269 U. S. 443, 458, where this Court pointed out that it evidenced a purpose to tax all transfers of legal title to shares whether technical sales or not. This view was reiterated in *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60, 62–63:

> The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. * * * The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

And in *Founders General Co.* v. *Hoey*, 300 U. S. 268, 275, this Court observed that "The statute defines the scope of the tax in terms whose breadth is emphasized by the careful particularity of its provisos."

Treasury Regulations 71 (1932 ed.), *supra*, relating to the stamp tax, definitely support rather than contradict the Government's position here. Article 35 (r), *supra*, upon which the petitioner relies, classifies as exempt those transfers of shares

which result wholly by operation of law without any voluntary act of the parties, such as from decedent to executor. However, among the examples of transactions subject to the tax set forth in the preceding Article 34 (r), *supra,* is found the transfer of stock owned by a corporation which is merged into another corporation, such a transfer being considered as resulting from the act of the parties and not wholly by operation of law.

The contention that the transfer of legal title here was a transfer wholly by operation of law (Pet. 5–6) is refuted by all of the acts preliminary to the filing of the certificate of consolidation, including those of the boards of directors, officers and stockholders, which are summarized in the statement of facts, *supra.* In this respect, a "consolidation" cannot be distinguished from a "merger," as petitioner suggests; in both cases there is a definite change in the stockholders' interest in a business, and in both that change occurs because the stockholders, directors, and officers will it. The decision below is thus in full accord with *Koppers Coal & Transportation Co.* v. *United States,* 107 F. (2d) 706 (C. C. A. 3d), in which the stamp tax was held applicable to a transfer of stocks resulting from a Delaware merger.

2. Petitioner asserts a conflict with *United States* v. *Merchants' National Trust & Savings Bank,* 101 F. (2d) 399 (C. C. A. 9th). In that case the trust department of one bank was sold to another bank pursuant to Section 31 of the California Bank Act,

and the question was whether the resultant transfer of title to the securities held in the trust accounts was subject to the stamp tax. The court held that the transfer was not subject to the tax, in part because the transferee bank was deemed to have succeeded to the securities solely by operation of California law. Irrespective of the correctness of that decision, the facts upon which it was based are obviously very different from those here involved. The conflict between the decisions, if any, relates solely to the effect to be given to state law in applying the Regulations; the Circuit Court of Appeals for the Ninth Circuit believed that the question of whether a transfer is "by operation of law" within the meaning of the Regulations depends solely upon local law, while the court below, although deeming state court decisions to be "of persuasive value," held that they "cannot be determinative as to what is a transfer under federal law" (R. 96). That this apparent difference in view may be a result of a difference in statement rather than of a difference in opinion is indicated by the earlier decision of the Circuit Court of Appeals for the Ninth Circuit in *Welch* v. *Kerckhoff*, 84 F. (2d) 295, in which the court squarely held that the operation of the federal stamp tax statute is not dependent on state law. But even if the cases may be considered as being in conflict on this point, the conflict may be taken to have been resolved by the decision of this Court in *Morgan* v. *Commissioner*, 309 U. S. 78. That decision, although concerned with the estate tax rather than

the stamp tax, plainly discredits the principle enunciated in the *Merchants' National Bank* case.

Furthermore, since the question at issue relates to the operation of the Regulations, rather than to the meaning of a specific statutory provision, any necessary clarification can readily be secured through administrative action.

3. There is no conflict with *Helvering* v. *Metropolitan Edison Co.*, 306 U. S. 522. The question there was whether there had been a merger, a question necessarily to be determined under local law. The question here, on the other hand, is whether the type of transfer accomplished by a statutory consolidation under the law of New York is the type of transfer which Congress has subjected to tax. On that issue, federal law is plainly decisive, classification of the transaction under local law being immaterial. *Morgan* v. *Commissioner, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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